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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 472

THE UNITED STATES OF AMERICA, PETITIONER

v.

EDNA W. BALLARD AND DONALD BALLARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 1625–1631) and the opinion of Judge Denman concurring in the denial of the Government's petition for rehearing (R. 1633–1634) are reported at 138 F. (2d) 540.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 21, 1943 (R. 1632). Petition for rehearing was denied on September 29, 1943 R. 1633). The petition for a writ of certiorari was filed on November 3, 1943, and was granted Jan-

uary 3, 1944. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

In a trial for use of the mails to defraud by the propagation of a purported religious movement, the trial judge stated to the jury that the truth or falsity of the religious representations or beliefs was not in issue, and that the defendants should be acquitted if they honestly and in good faith believed what they wrote and said, and convicted if they did not so believe but used the mails to obtain money. The statement was given with the approval of defense counsel, was relied on by them, and quoted in their summation, as a favorable view of their case.

1. May reversal of conviction be predicated on a statement of the trial judge given in the circumstances described?

2. Did the trial judge, by this statement, remove from the jury's consideration all issues in respect of fraudulent misrepresentation?

3. Assuming that no question of misrepresentation was submitted to the jury, did the issue submitted under the judge's charge constitute a scheme to defraud under the mail fraud statute?

STATUTE INVOLVED

The mail fraud statute (Section 215 of the Criminal Code, 18 U. S. C. 338), provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

An indictment in twelve counts charging use of the mails to defraud and conspiracy so to use the mails was returned in the United States District Court for the Southern District of California against Edna W. Ballard, her son Donald Ballard, and others (R. 2–22). The scheme to defraud set forth in the indictment charged that the defendants and Guy W. Ballard (who died before the indictment was returned) organized a purported religious organization known as the "I Am" movement, and in connection therewith formed and dominated two corporations known as the St. Germain Foundation and the St. Germain Press, established branch offices and meeting rooms in various cities, and arranged a number of radio programs; that as a means of inducing their followers to purchase books, charts, pamphlets, etc., and to make donations to defendants and the organizations controlled by them, defendants made a number of false and fraudulent representations. Among the misrepresentations charged in the indictment were claims that Guy W. Ballard had attained a supernatural state of immortality; that all the Ballards had been selected as divine messengers through whom the teachings of St. Germain and other "ascended masters" would be communicated to mankind; that the Ballards had the power to conquer disease, death, old age, poverty, and misery; that they could cure

and had cured persons of physical ailments; that they had the power to precipitate from the air money and other material riches; that they had received divine visitations from St. Germain and other supernatural entities who dictated the books published by defendants; that the Ballards had actually encountered the experiences related in the books of the movement; that St. Germain had appeared in person before Charles Sindelar who painted the saint's portrait; that books, charts, and phonograph records issued by defendants had special salutary qualities which would be transmitted to purchasers; that since a cataclysm was about to engulf the earth it was wiser to give money to defendants than to invest it in banks, homes, insurance, etc. (R. 2–22.)

The evidence for the Government may be summarized as follows:

In 1930, at Mt. Shasta, California, Guy W. Ballard wrote a book called "Unveiled Mysteries" which purported to be his true experiences (R. 257, 417, 507, 614, 757–758). It was first published and offered for sale in 1934 (R. 242). For approximately two years before that time, Guy W. Ballard and his wife, Edna Ballard, had been conducting classes in Chicago at which they read portions of the manuscript of "Unveiled Mysteries" and a second book called "The Magic Presence" (R. 242, 427–430, 475, 553). In the fall of 1934 the Ballards engaged Harry Sieber

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to act as their business manager and agreed to give him a percentage of the amount received from the sale of the books (R. 271, 274, 285–287, 291). Arrangements were made to have the Ballards conduct classes in various cities at which the disciples would understand that "love gifts" to the "messengers" would be acceptable, the proceeds of such gifts to be divided equally between the Ballards and Sieber (R. 273–274, 278–279, 291). The tour was a financial success, each class resulting in gifts totaling approximately $1,000 (R. 295–296).

Thereafter, the "I Am" movement grew rapidly. Disciples were appointed "messengers" and given authority to conduct classes and reading rooms in various cities (R. 431–433, 435–437, 487–489, 755, 765–766). The local groups operated independently but purchased books, charts, records, etc., from the St. Germain Press, a business corporation wholly owned by the Ballards (R. 240, 436, 584, 615, 755–756, 762–766). The Ballards themselves conducted a number of classes in various cities at which autographed books were sold and substantial love offerings received (R. 561–562, 616, 632, 767). At one of the classes conducted in Los Angeles between July 1 and July 17, 1938, the receipts totaled $27,796.22 of which $12,454.75 represented love gifts (Ex. 142, R. 562). At another class conducted from June 30 to July 16, 1939, receipts totaled $17,613.36 of which $9,435.15 consisted of love gifts (Ex. 142,

R. 562). By 1940 the publications consisted of seven volumes published by the St. Germain press (R. 234, 241–242, 553) and a magazine called "The Voice of the I Am" published by a follower of the movement (R. 1058). Each student was urged to buy his own set of books and to refrain from lending his copies to others, as the radiation of another person would lessen the beneficent effect (R. 400, 510, 614–615). The radio was used extensively, approximately $190,000 being spent for radio advertising (R. 253–254, 645–646). Records for radio transcriptions were sold to the local groups, who assumed responsibility for the sponsoring of broadcasts (R. 437, 448–449, 646–647, 654–655, 666–668, 679, 684, 759). Phonograph records, advertised as having a special healing quality because of their blue color, and a painting, represented as the perfect likeness of St. Germain as he appeared to the Ballards and to the artist, Sindelar, were offered for sale (R. 349, 352, 354, 590, 644, 647). The Ballards engaged in extensive correspondence with persons throughout the country, receiving between 25 and 50 letters a day (R. 538). About one-fourth of the letters enclosed money as love gifts (R. 538).

Among the representations of the movement were the following:

Divine Visitations.—St. Germain and Jesus had appeared before the Ballards in tangible form, so that they could shake hands (R. 243, 257, 262, 398–399, 596, 737–738, 757–758). St. Germain and

other "ascended masters" dictated the published discourses of the movement (R. 254–255, 507–508, 614). These masters would appear before group meetings in their tangible form (R. 398–399, 506, 570).

Healing.—The invocation of the great "I Am Presence" would cure diseases considered by medical science incurable (R. 249–250, 258, 260, 264, 394, 405–406, 443–444). Thousands of people had been cured in this manner (R. 249–250, 258, 406, 444, 572).

Ascension.—Until 1938, the Ballards taught that human beings would ascend in their physical body; that this could be accomplished before death; that the ascended person could thereafter return to earth (R. 433–435, 509–510, 569, 628–629, 713); and that Ballard himself had made the ascension and had been purified (R. 755). Late in 1938 a new dispensation was announced by which it was proclaimed that the physical body would remain on earth but that the etheric body would ascend (R. 443; see R. 938, 978).[1]

Precipitation.—Persons who adhered to the teachings of the movement would be able to precipitate from the air gold, jewels, and other material needs. The sparkles of light that one saw in the sunlight were the elements from which the desired substances would be precipitated. (R. 397, 450, 476–477, 715, 761.) One of the dis-

[1] Guy W. Ballard died in December 1939 (R. 533, 743–744).

courses explained to the students how "money may be precipitated without interfering with the government allotment" (R. 482–484, later printed in Ex. 5, pp. 118–120).

Cataclysm.—A cataclysm was soon to engulf the earth but the followers of the "I Am" movement would be saved (R. 401, 409, 445, 507, 854). In fact, the presence of the Ballards had saved San Francisco from destruction (R. 401–402, 588, 854).

The books and discourses purporting to be dictations from the ascended masters were elaborated upon and revised (R. 429–430, 475, 557–560). Factual errors were called to the Ballards' attention and were corrected (R. 345–346, 359).

The foreword of the book "The Magic Presence" contains the following statement:

> The retreats, people, and instruments which I saw and associated with while with the Ascended Masters are real physical places and things and tangible living breathing beings. They were not imaginary or symbolic and are not to be interpreted in any such way. (R. 757–758; Ex. 4, XII.)

The book recounts alleged experiences of Guy W. Ballard in Europe and in Asia over a period of several years beginning in 1931 (Ex. 4, p. 132), complete with such details as the fact that he took a taxi (p. 226); that considerable tipping was required to secure passage on a steamship

(pp. 226–227); that he sailed on the S. S. *Majestic* which was escorted out to sea by tugboats (p. 297); that his boat docked at Cherbourg (p. 310); that he visited the Louvre (p. 311) and drove to Marseilles by car (p. 312); that he was taken to "a private old hostelry, quaint but spotlessly clean" (p. 313); that they spoke to an old vender of jewels in Alexandria (p. 315); and that they rode on small mountain ponies in India (p. 370). Numerous witnesses, both for the prosecution and for the defense, testified that they believed in the truth of the narrative portions of the book and that such belief induced them to buy the book and join the movement (R. 408, 640, 757, 942, 958, 962, 986, 1045, 1087, 1102). During the years from 1931 to 1934 the Ballards were in fact living in Chicago (R. 553).

Despite the curative powers allegedly possessed by the Ballards, both Mr. and Mrs. Ballard and their followers suffered from illnesses and accidents (R. 332, 395, 446, 489, 534, 536; 512, 604, 743–744). While Guy W. Ballard was on his death bed, Mrs. Ballard told the class that he was with St. Germain doing special work (R. 715). Mr. Ballard's secretary, who was with him constantly, never heard anyone say he had been cured of cancer, although the Ballards represented that they had cured the disease (R. 406, 572). Two former followers of the movement testified that they had not observed any healings accomplished at the call of the messen-

gers (R. 406, 457). Requests for healing advice were answered by form letters and subordinates were told to "say the usual thing" in reply (R. 368–369, 420, 540, 548–549).

The blue phonograph records alleged to have a special healing radiation as the result of long preparation (R. 590) were prepared by the manufacturer without receiving a formula from the Ballards, and the final product was chosen from among several samples submitted to the Ballards (R. 645–647).

Before 1935, the Ballards used as the picture of St. Germain a photograph of a painting in which scrolls and an ancient script were employed as decoration. The photograph appeared in early editions of the book "Unveiled Mysteries" (Ex. 3; see R. 1063). The picture had been painted in about 1923 by Theresa de Carranza, and a photograph thereof was in Mr. Ballard's possession in 1930 (R. 836–837, 841, 1068–1070). The artist who painted the picture which was subsequently advertised as the result of a revelation by St. Germain (R. 349)[2] testified that his painting was the result of a men-

[2] Government's Exhibit 97 (R. 349), a circular advertising the painting, read as follows:

"The picture which Mr. Sindelar has painted of St. Germain is an absolute perfect likeness of him as we have seen him many times in the tangible body.

"St. Germain revealed himself to Mr. Sindelar previous to and while he was painting St. Germain's likeness and he has said that it was splendid.".

tal impression, that he had previously seen the picture appearing in "Unveiled Mysteries" and that the scrolls and script were copied from the photograph in the book (R. 1061–1064).

On several occasions Donald Ballard stated that the movement was "bunk" and that he would like to expose the work as a "fake" (R. 335, 595, 613).

A commercial spirit permeated the activities. According to letters introduced in evidence, St. Germain was concerned with such financial details as a 33⅓% limit on the discount for books (R. 285–287, 305), the manner of selling the picture (R. 354), and the sponsorship of radio programs (R. 684, 689, 692–693). The Ballards were careful to prevent the wholesale book business from slipping out of their hands (R. 306–307, 330–331). If there was an oversupply of one book its sale was stressed above the others (R. 368, 709). The publication of a new book of songs was announced as an important message from "the great harmony" (R. 587–589). Credit was sparingly extended in the sale of books and radio transcriptions (R. 297, 654–655). The Ballards were dissatisfied when receipts from love gifts at classes were not large (R. 368, 571, 723, 759) and reported to the staff that St. Germain had directed the students not to go to places where they could not make expenses (R. 563). The copyrights for the books, records, charts, etc., were held by the St. Germain Press, the

Ballards' business corporation (R. 240).[3] Mrs. Ballard and Donald Ballard had no source of income other than the "I Am" activity (R. 875, 879, 1080, 1140).[3] Their scale of living was such that, when Donald was only 18, he was given $11,000 in five months (R. 598).

Early in the trial, while Mrs. Schall, a former devotee of the movement, was on the stand (R. 393), the Government, over defendants' objection, introduced in evidence a number of books and magazines of the movement and read therefrom (R. 394–402). A conference of counsel was then held outside the presence of the jury (see R. 1346). The minutes of that conference have not been printed in the record; but summation by one of the defense counsel, in which he refers to the matter, shows that the relation of religious liberty to the trial of the case was there discussed (R. 1346). The trial judge then formulated his concept of the issues in the following statement to counsel which he thereafter repeated to the jury at "the request of counsel for both sides" (R. 402–404; see R. 1346–1347).[4]

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[3] A list of the publications, records, etc., sold by the St. Germain Press appears in the back pages of each issue of "The Voice of the I Am" together with an announcement that the copyright is held exclusively by the St. Germain Press and the Ballards (see Exs. 10–67, 196–199).

[4] The transcript of the minutes of the conference shows that defense counsel made the suggestion that the judge repeat his statement to the jury at that time.

Now, gentlemen, here is the issue in this case:

First, the defendants in this case made certain representations of belief in a divinity and in a supernatural power. Some of the teachings of the defendants, representations, might seem extremely improbable to a great many people. For instance, the appearance of Jesus to dictate some of the works that we have had introduced in evidence, as testified to here at the opening transcription, or shaking hands with Jesus, to some people that might seem highly improbable.

I point that out as one of the many statements.

Whether that is true or not is not the concern of this Court and is not the concern of the jury—and they are going to be told so in their instructions. As far as this Court sees the issue, it is immaterial what these defendants preached or wrote or taught in their classes. They are not going to be permitted to speculate on the actuality of the happening of those incidents. Now, I think I have made that as clear as I can. Therefore, the religious beliefs of these defendants cannot be an issue in this Court.

The issue is: Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted. I cannot make it any clearer than that.

If these defendants did not believe those things, they did not believe that Jesus came

down and dictated, or that Saint Germain came down and dictated, did not believe the things that they wrote, the things that they preached, but used the mail for the purpose of getting money, the jury should find them guilty.

Therefore, gentlemen, religion cannot come into this case. I want to assure Judge Armstrong and the defendants and the Government that it will not be permitted to come in.

Now, we take up the third point, so there is going to be no misunderstanding so far as the Court is concerned.

No attack can be made, therefore, on whether or not these things happened, but when you have a program or you have certain representations set out, you have got to show what they were. And the defendants, I assume, from counsel and counsel's statements with reference to the books and pamphlets, have not so far withdrawn a single word of what they have written or what they have preached. The defendants, so far as I can gather it from the case, although they haven't started to put it in, are standing on the whole—not program, but the whole conception (I think that is a better word)—the whole conception of their relationship with the deity or, as it is used here, with the I Am Presence.

Now, gentlemen, that is going to be made so clear to this jury that they are not going to misunderstand it. And that is the whole case.

> Now, of course, gentlemen, the degree of proof, burden of proof beyond a reasonable doubt and the fact the defendants are clothed with the presumption of innocence which stays with them during the trial, and all of those different principles of law will be covered more completely and thoroughly in the Court's instructions to you at the conclusion of the trial. So that what I have said now, if you will please bear it in mind and carry it into the instructions, a part of which may be repeated, but don't isolate this from the instructions.

That statement was relied upon by defense counsel during the trial (R. 502, 1125–1126). It was repeated in substance in the summation by one defense attorney and verbatim by another as representing the "fundamental basis of this lawsuit" (R. 1336, 1346–1349). In his charge to the jury at the close of the case the judge repeated his prior instruction that "The religious beliefs of these defendants are not an issue in this court and not for your consideration" (R. 1576). The admonition was reiterated during the charge (R. 1571–1572, 1573, 1575, 1576, 1588–1590):

> This case does not present a question of the lawfulness of the calling of a mental healer, or of a religious healer, or whether or not mental science or prayer healing is a fraud, but it presents the question of the good faith of the defendants. You should consider this case with the distinct understanding that the practice of mental heal-

ing, suggestive healing, or healing by prayer, or other religious process, is, in Federal law, as lawful as healing by drugs, or by any science or practice. As to the right to use the postal establishment of the United States, no discrimination is made between those whose vocation is healing, whether they be allopathists, homeopathists, ostopathists, mental scientists or Christian Scientists, or the "I Am" doctrine. (R. 1571–1572.)

* * * * * *

The defendants are not on trial for evolving or devising an improvident or impractical scheme, even though you should find their activity or movement to be such. Nor are the defendants on trial for mere errors of judgment; nor are they on trial for devising a new religion, if it be such, with whose tenets you may not agree. The question here is not, insofar as the particular doctrines taught by the defendants are concerned; whether or not those doctrines are sound, or even plausible, but whether or not they were promulgated in good faith and not for the purpose of fraudulently obtaining money from others.

If, in promulgating those doctrines, even though the defendants received money therefor and used the money as charged, the defendants were acting in good faith, they were not, as to them, engaged in a scheme to defraud. If you have reasonable doubt as to whether or not the defendants were acting in good faith, you should acquit

them or those of them whom you find may have acted in good faith. (R. 1573.)

* * * * *

The question of the defendants's good faith is the cardinal question in this case. You are not to be concerned with the religious belief of the defendants, or any of them. The jury will be called upon to pass on the question of whether or not the defendants honestly and in good faith believed the representations which are set forth in the indictment, and honestly and in good faith believed that the benefits which they represented would flow from their belief to those who embraced and followed their teachings, or whether these representations were mere pretenses without honest belief on the part of the defendants or any of them, and, were the representations made for the purpose of procuring money, and were the mails used for this purpose. (R. 1575.)

* * * * *

Some of the teachings or representations of the defendants might seem extremely improbable to a great many people—* * *—these and other similar representations and statements might seem highly improbable to many people. Whether these incidents actually happened or not is not for your consideration. The religious beliefs of these defendants are not an issue in this court and not for your consideration. The issue is: "did these defendants honestly and in good faith, believe that these inci-

dents actually happened?" If they did they should be acquitted. If these defendants did not believe these incidents actually happened and did not believe that Jesus came down and dictated or that Saint Germain came down and dictated, and did not believe the representations and statements which they wrote, nor the statements and representations which they preached, and used the mails for the purpose of getting money, or other things of value, you should find them guilty. (R. 1576.)

* * * * *

With reference, further, to this question of intent, you are instructed that if defendants honestly believed in the doctrines which they announced, then no matter how visionary their views may have been, no matter how ill-founded their conclusions may have been, no matter how much sheer incompetence in the exercise of business judgment may have been their portion, unless, in the making of the statement and representations complained of, they were actuated by an intent to defraud, they are entitled to go free and your verdict should so determine.

The ultimate question of fact before you as a jury is as to the good faith of the defendants, and that question involves their belief in their representations and promises. While their belief is not the subject of direct proof, it may be ascertained from circumstances, and by proof of their actions and declarations. If the defendants

> were practicing their calling in good faith, the fact that they received compensation for their advice and services is of no consequence. (R. 1588–1589.)

Edna Ballard was found guilty on Counts 2, 3, 5, 7, 8, 11, and 12 [5] and was sentenced to one year on each count to run concurrently and to pay fines totaling $8,000 (R. 170, 180); Donald Ballard was found guilty on counts 8, 11, and 12 and was sentenced to 30 days on each count to run concurrently and to pay fines totaling $400 (R. 171, 182). Both prison sentences were suspended and defendants placed on probation for one year. The four other defendants were found not guilty on all counts (R. 172–176).

On appeal to the Circuit Court of Appeals, a divided court reversed the convictions on the ground that the above quoted statement by the trial judge erroneously removed from the jury's consideration the truth or falsity of the representations alleged in the indictment (R. 1631). The Circuit Court of Appeals found no other error in the conduct of the trial and found that there was substantial evidence to support the verdict if the issues had been properly presented to the jury (R. 1631). A petition for rehearing was denied, again by a divided court (R. 1632–1633). Judge Denman in a separate opinion, concurring in the denial of the peti-

[5] The checks and letters forming the basis of these counts were proved to have been sent through the mails (R. 373–374, 439–442, 589, 630).

tion for rehearing, took the position that the definition of the issues by the trial judge prevented the defendants from offering proof that the miraculous events had actually occurred, as evidence of their honest belief (R. 1633–1634).

SUMMARY OF ARGUMENT

I

In reversing the judgments of conviction, the court below took the view that the respondents' claims of supernatural visitations and their asserted beliefs were inescapably matters of fact the truth or falsity of which had to be submitted to the jury. The trial judge was of a different view. With respect to those matters he limited the issue to the honesty or good faith of the defendants' beliefs. This formulation was most consonant with the guarantee of religious freedom. As the record shows, counsel for the defendants welcomed the trial court's statement in this regard as the most favorable presentation of their case. Hence it is particularly appropriate here to apply the rule, held controlling in *Johnson* v. *United States*, 318 U. S. 189, 201, that a defendant may not pursue one course at the trial and, when it has proved unsuccessful, repudiate it on appeal.

Defense counsel's approval and reliance upon the trial judge's statement makes untenable, we submit, Judge Denman's position that respondents were precluded from offering proof that the mirac-

ulous events had actually occurred, as evidence of good faith. Respondents were not prevented from offering any proof which they wished to offer. Numerous witnesses took the stand in respondents' behalf in an endeavor to convince the jury of respondents' good faith. That they failed was not due to the exclusion of evidence. Four co-defendants were found not guilty.

II

In thus defining the issues, the trial court may have submitted to the jury less than the indictment charged; but respondents were not thereby injured; and if the issues which he did submit constituted an offense which was charged in the indictment and supported by the evidence, the convictions should not have been reversed. The issues left to the jury for determination did comprehend an offense charged under the mail fraud statute.

A. The statement by the trial judge did not withdraw from the jury's consideration all issues of fraudulent misrepresentation. The judge's statement related only to religious concepts and did not eliminate from the case the misrepresentations of ordinary fact charged in the indictment and established by the evidence. Since, as the circuit court of appeals acknowledged, the evidence was sufficient to support a finding of false and fraudulent representations, the convictions should have been affirmed under the settled rule

that in a mail fraud prosecution it is not necessary that the Government prove all the representations set forth in the indictment.

Even as to those representations relating to the religious beliefs of the defendants, the judge's charge defined an offense under the statute. The finding that defendants did not have the belief in their own doctrines which they represented themselves as having, was a finding that they made a material misrepresentation of fact. State of mind is itself a fact about which materially false and fraudulent representations may be made. *Seven Cases* v. *United States,* 239 U. S. 510, 517–518. Moreover, the statute prohibits the use of the mails in a scheme for obtaining money by false *or* fraudulent representations. The assertion in bad faith of a belief or opinion not honestly entertained is fraudulent. When the jury found that defendants made representations of a religious character in which they did not believe and on the basis of which they collected funds for their own use, it found that such representations were material and fraudulent.

B. Apart from the foregoing considerations relating to the element of false or fraudulent representations, the convictions should have been affirmed on the ground that the scheme which the indictment charged, the evidence proved, and the jury found, was a scheme to defraud under the mail fraud statute. The history of that statute

and the decisions interpreting it show that it provides for alternative offenses: the devising of a scheme or artifice (1) to defraud or (2) for obtaining money by false or fraudulent pretenses, representations or promises. Any intentional effort to despoil the public is a scheme to defraud, whether or not false representations are made in the course thereof. Illustrative are the decisions concerning schemes which involve breach of trust by public officials or by fiduciaries. Under the judge's charge, the jury must have concluded that respondents in bad faith organized a purported religious movement in which they did not believe, and used the mails in order to obtain money thereby. Such a scheme is a scheme to defraud condemned by the statute.

ARGUMENT

I

THE INSTRUCTION UPON WHICH REVERSAL WAS PREDICATED WAS APPROVED AND RELIED ON BY DEFENDANTS AS FAVORABLE TO THEIR CASE AND DID NOT CAUSE EVIDENCE ON THEIR BEHALF TO BE EXCLUDED

The essence of the Government's charge against respondents in this cause is that, under the guise of a religious movement, they used the mails to perpetrate a fraud. It is clear that conviction on such a charge does not violate the First Amendment. The guaranty of religious freedom there embodied, broad as it is, does not

protect from punishment every form of conduct violative of a general criminal statute enacted for the protection of the morals, health and welfare of the community. *Davis* v. *Beason*, 133 U. S. 333, 345; *Reynolds* v. *United States*, 98 U. S. 145, 166; *Baxley* v. *United States*, 134 F. (2d) 937 (C. C. A. 4). The federal courts have recognized, specifically, that a person is not exempt from prosecution under the mail fraud statute merely because he cloaks a scheme to defraud in the guise of religious belief.[6]

Such a prosecution under the mail fraud statute does, however, present a special problem. One element in the proof that a defendant fraudulently used a religious movement is to show the beliefs which he propagated. Yet to submit to a jury the question of the actual truth of his representations, as distinct from the honesty with which they are propounded, is to run the danger of transforming a mail fraud prosecution into a trial of the truth or falsity of asserted supernatural manifestations. Claims of supernatural visitation, by their nature, cannot be proved or disproved in the same manner as an

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[6] *Crane* v. *United States*, 259 Fed. 480, 482 (C. C. A. 9); *New* v. *United States*, 245 Fed. 710, 712 (C. C. A. 9), certiorari denied, 246 U. S. 665; *United States* v. *Schlatter*, 235 Fed. 381, 383 (S. D. Cal.); *United States* v. *White*, 150 Fed. 379, 390 (D. Md.); *Post* v. *United States*, 135 Fed. 1, 9 (C. C. A. 5); *United States* v. *Ried*, 42 Fed. 134, 137 (W. D. Mich.).

ordinary representation of fact.[1] A jury should not be required inescapably to pass upon such questions. It is a fixed principle of our law that religious beliefs, as distinguished from the acts which grow out of such beliefs, are not subject to the judgment of our courts. "Thus the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell* v. *Connecticut*, 310 U. S. 296, 303–304.

Such considerations properly prompted the trial judge to make the statement (*supra*, pp. 14–16) upon the basis of which the circuit court of appeals reversed the conviction. He said (R. 402–404):

> * * * the religious beliefs of these defendants cannot be an issue in this court.
>
> The issue is: Did these defendants honestly and in good faith believe those things * * *.
>
> No attack can be made, therefore, on whether or not these things happened, but when you have a program or you have certain representations set out, you have got to show what they were.

It is unnecessary to consider whether a trial judge would be obliged to open up the issue of the

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[1] Cf. *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 106, where this Court held that matters of medical opinion, such as the efficacy of mental healing, did not present a question of fact upon which a postal fraud order could be based.

truth of defendants' representations of religious phenomena in the unlikely event that defendants should seek to present proof thereof. In the present case counsel for the defendants, not unnaturally, were wholly content to rest their case on the issue of good faith in the representations made.

The record as printed (see note 4, page 13, *supra*) shows beyond question that defense counsel welcomed and approved the instruction by the trial judge which the circuit court of appeals found to constitute reversible error. One of the defense counsel in his closing argument quoted in full the preliminary instruction now attacked (R. 1346–1349), and the quotation itself reveals that the instruction was given at "the request of counsel for both sides" (R. 1346). Respondents' motions to strike out certain of the Government's evidence at the close of the Government's case were in large part supported by the claim that such evidence would enable the jury to speculate upon matters which the court had held were not in issue (R. 883–930). Several of the objections were expressly predicated upon the statement (R. 884, 886). Questions propounded by the prosecuting attorney in cross-examination of defense witnesses were disallowed because of that statement (R. 502) and defense counsel based the presentation of their case thereon (R. 1125–1126).

We have thus a case in which five eminent and experienced counsel (see R. 1183–1184) not only

did not object to the statement which the circuit court of appeals deemed to be reversible error, but actually asked for it, approved it, and on repeated occasions relied heavily upon it.[8] We are not here urging the technical rule that failure to object precludes review, although, in view of the fact that the evidence was found amply sufficient to support the verdict, a reversal might have been denied on such ground alone.[9] This is not a case where, through inadvertence, counsel failed to object to plain error. This is a case where a position deliberately chosen as favorable by experienced counsel is being repudiated because it was unsuccessful. It is therefore a case in which it is peculiarly appropriate to invoke the rule, recently iterated by this Court in *Johnson* v. *United States*, 318 U. S. 189, 201, that a defendant may not pursue one course at trial, and when it has proved unprofitable, repudiate it on appeal and thereby trap the trial court into error. As in

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[8] Trial counsel did not participate in the appeal (Cf. R. 218).

[9] *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238–239; *Holmgren* v. *United States*, 217 U. S. 509, 523, 524; *Allis* v. *United States*, 155 U. S. 117, 122; *Tucker* v. *United States*, 151 U. S. 164, 170; *Simon* v. *United States*, 123 F. (2d) 80, 85 (C. C. A. 4), certiorari denied, 314 U. S. 694; *United Cigar Whelan Stores Corp.* v. *United States*, 113 F. (2d) 340, 346 (C. C. A. 9); *United States* v. *Manton*, 107 F. (2d) 834, 846 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Girson* v. *United States*, 88 F. (2d) 358, 360 (C. C. A. 9), certiorari denied, 301 U. S. 697; *Morris* v. *United States*, 61 F. (2d) 520, 521 (App. D. C.); cf. *United States* v. *Atkinson*, 297 U. S. 157, 160.

the *Johnson* case, *supra*, the failure of defense counsel, in their motions for a new trial and in arrest of judgment (R. 1605–1608), to urge the position taken in the circuit court of appeals shows clearly that respondents' objection to the trial judge's statement was a "mere afterthought."

The reliance which defense counsel placed on the trial judge's statement renders untenable, it is submitted, Judge Denman's position that the definition of the issues prevented respondents from proving that the miraculous events had actually occurred, as evidence of good faith (R. 1634). That position not only fails to recognize that such miraculous events should not readily be made the subject of proof,[10] but ignores the fact

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[10] The rule which Judge Denman enunciates would have the same unfortunate results as that prescribed by the original decision. If a defendant may prove good faith by showing that a miracle had actually occurred, the Government would be entitled to prove bad faith by showing that it had not occurred. The courts need not so far divorce logic from reality as not to realize that such a rule would result in more harm than benefit to a sincere believer; that it would be easier to convince a jury of the improbability than of the probability of any particular miracle. The best protection of the religious liberties of the sincere believer is to adhere to the principle that such matters are not questions of fact to be tried in a court.

Compare J. B. Thayer, *Legal Essays*, pp. 327–328 (*Trial by Jury of Things Supernatural*):

"It is not impossible that we may yet see something of this sort done about Spiritualism; that is to say, may see the question passed upon whether it is or is not true. But so far, in

that defense counsel gave their full approval to the trial judge's statement. Respondents were not deprived of the opportunity to offer any evidence which they wished to offer. Forty-seven witnesses, including defendants themselves, took the stand in an endeavor to convince the jury of respondents' good faith. That they failed was not due to the exclusion of proof.[11]

There remains the question whether the issues left to the jury and resolved in the Government's favor constituted an offense under the statute.

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modern times, such things do not come up in this way. When Spiritualists get into court nowadays, it is on the charge of defrauding people and using undue influence, as in the case of Home in England, twenty years ago, who was compelled to return several hundred thousand dollars' worth of property to a woman of seventy-five, a Mrs. Lyon, who had given it to him on the faith of certain alleged messages from her deceased mother; it was a mere question of undue influence, of the abuse of a relation of confidence.

"And so of the case of a Mrs. Fletcher, who, a few years ago, was found guilty, in London, of obtaining property by false pretenses and conspiracy. She has written a book about it, and insists that her spiritual communications were genuine, and so the pretenses were not false; and that the court wrongly rejected an offer on her part to prove them true, and so condemned her wrongly. But it appeared to the tribunal like a pretty vulgar case of fraud. The court left to the jury fairly the question of her own belief in the manifestations, which was the main thing."

[11] It is noteworthy that while respondents were convicted, four co-defendants were acquitted. Since these four defendants admittedly took an active part in the advancement of the movement (R. 1015, 1088–1089, 1168–1169, 1172–1173), their acquittal shows conclusively that the jury was following the trial court's admonition to judge good faith and not the doctrines themselves.

II

THE ISSUES SUBMITTED TO THE JURY COMPREHENDED AN OFFENSE UNDER THE MAIL FRAUD STATUTE

A. THE COURT DID NOT REMOVE FROM THE JURY'S CONSIDERATION ALL ISSUES OF FALSE OR FRAUDULENT REPRESENTATION

In limiting the issues in respect of religious representations to the question of good faith, the trial judge may well have submitted to the jury less than the indictment charged. But if the issues which he did submit for the jury's determination constituted an offense which was alleged in the indictment and supported by the evidence,[12] it was of course error to predicate reversal of the conviction upon the well-considered statement which was approved and relied upon by counsel for the respondents. We think it is clear that the trial judge did submit to the jury issues of false or fraudulent representation which define an offense under the mail fraud statute.

1. *False representations of fact.*—The majority opinion below is apparently predicated upon the assumption that all the representations set forth

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[12] A conviction will not be set aside because of failure to prove or to submit to the jury some of the allegations set forth in the indictment, if the remaining allegations which were proved are sufficient to constitute an offense. *Hall* v. *United States*, 168 U. S. 632, 639; *Glover* v. *United States*, 125 F. (2d) 291, 293 (C. C. A. 5), certiorari denied, 316 U. S. 690; *Leche* v. *United States*, 118 F. (2d) 246, 247 (C. C. A. 5), certiorari denied, 314 U. S. 617; *Friscia* v. *United States*, 63 F. (2d) 977, 981 (C. C. A. 5), certiorari denied, 289 U. S. 762. Cf. *Salinger* v. *United States*, 272 U. S. 542, 549.

in the indictment relate to matters of religious beliefs, and that the judge's statement thus withdrew from the jury's consideration the truth or falsity of all such representations, leaving only the question of appellants' good faith. The statement, however, was not intended to have, and could not have had, such effect. It is carefully limited to "representations of belief in a divinity and in a supernatural power"; to "the whole conception of their relationship with the Deity, or, as it is used here, with the I Am presence." When he first made the statement during the testimony of Mrs. Schall, the judge specifically directed the jury not to isolate his remarks from the instructions to be given to them later (R. 404). In his charge to the jury, he defined religion in the language of *Davis* v. *Beason,* 133 U. S. 333, 342, as having reference "to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will" (R. 1574). He followed that definition with a repetition of his earlier statement (R. 1576). Prior and subsequent thereto, he repeatedly instructed the jury that they must find a scheme to defraud substantially as alleged in the indictment (R. 1568, 1570); that, to be guilty, appellants must have employed "any one of the false and fraudulent representations and pretenses alleged" (R. 1570); "that even though * * * persons are advocating a religious activity, that they must do so in

good faith and without making any substantial misrepresentations with the intent to deceive" (R. 1572); that "'Fraud' as used in this connection may be defined as an intentional perversion of the truth for the purpose of obtaining some valuable thing from another" (R. 1584); that there was a violation of the statute "where misrepresentations as to past or present facts are used or false promises made as to the future" (R. 1584); that

> If the representations intended to be made, as alleged in the indictment, were false, and the defendant honestly believed them to be true, then such representations would not be fraudulent. If, however, such representations were false and the defendant, knowing their falsity or not believing them to be true, intended that they should be made to deceive and induce certain persons to whom they were to be made, to part with value, then said scheme was one to defraud. (R. 1589)

The portion of the judge's charge to which the majority opinion below took exception, therefore, withdrew from the jury's consideration only the truth or falsity of those representations which related to religious concepts.

The indictment and proof include, however, representations of fact which do not fall within the scope of religious beliefs as defined to the jury by the trial judge. Item 7 (R. 12) alleges in part that respondents "had in fact cured

* * * hundreds of persons afflicted with diseases and ailments." Respondents' publications show that such representations were made (Exhibit 10, p. 23; Exhibit 47, pp. 6–7; Exhibit 55, p. 12; see also Statement, *supra*, p. 8).[13] The evidence (*supra*, pp. 10–11) supports a finding by the jury that such representation of fact was false and known by respondents to be false. Item 10 (R. 14) alleges in part that respondents represented that they had "actually encountered the experiences pertaining to each of their said names as related and set forth in said books, whereas in truth and in fact none of said persons did encounter the experiences". As shown in the Statement (*supra*, p. 9), the foreword to the book "The Magic Presence" is couched in such terms that a jury would be warranted in finding that respondents represented that the experiences related occurred on a physical plane. Such representations were conclusively shown to have been false, it having been shown, indeed, that during the years when Ballard was represented as undergoing significant experiences in Europe and Asia he was in fact living in Chicago (*supra*,

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[13] *E. g.*, Exhibit 10, February 1936 issue "Voice of the I Am," p. 23: "In Long Beach countless healings took place during the lectures." Exhibit 47, pp. 7–8, "The Mighty Victory's Discourse": "There are thousands of people who have been healed at one call of the messengers"; Exhibit 55, p. 12; "The healing that takes place at their [the messengers'] call every hour of the day, week after week, and month after month, is unparalleled on earth."

p. 10). Item 14 (R. 17) sets forth a representation that phonograph records sold by respondents had salutary qualities, whereas respondents "well knew that said * * * records were man-made and had no ability to aid in achieving salvation." The Government's evidence as to the manner in which these records were prepared (*supra*, p. 11) supports a finding that such representation was a knowingly false representation of fact.

The jury could not have interpreted such representations of fact as relating to respondents' "whole conception of their relationship with the Deity." Read as a whole, the judge's charge instructed the jury that they must find a scheme to defraud substantially as charged in the indictment; that as to religious beliefs they could consider only good faith; and that they must find at least one false and fraudulent misrepresentation. They were specifically told (R. 1570):

> It is not essential that the Government prove each and every false pretense or representation alleged to have been made or intended to be made, but it is essential that proof be made that defendants did devise a scheme to defraud of substantially the kind and character alleged, and that one or either of them employed any one of the false and fraudulent representations and pretenses alleged, and in furtherance of such scheme used the United States mails in the manner alleged in the indictment.

Accordingly, since the critical instruction did not touch upon the factual representations which the jury must have found to be false—a finding which the circuit court of appeals held supportable by substantial evidence (R. 1631)—the judgments of conviction should have been affirmed under the settled rule that it is not necessary for the Government to prove all the representations set forth in the indictment.[14]

2. *Misrepresentation of belief.*—Even if it were to be assumed that the instructions withdrew from consideration the false or fraudulent character of all representations of fact and left open only the issue of good faith, the judgment should have been sustained on the basis of the jury's finding that respondents had no belief in the doctrines which they propagated. As this Court stated in *Seven Cases* v. *United States*, 239 U. S. 510, 517–518:

> state of mind is itself a fact, and may be a material fact, and false and fraudulent misrepresentations may be made about it.

See also *Philadelphia Storage B. Co.* v. *Kelley-How-Thomson Co.*, 64 F. (2d) 834, 837 (C. C. A. 8), certiorari denied, 290 U. S. 651.

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[14] *Simons* v. *United States*, 119 F. (2d) 539, 549 (C. C. A. 9), certiorari denied, 314 U. S. 616; *Baker* v. *United States*, 115 F. (2d) 533, 541 (C. C. A. 8), certiorari denied, 312 U. S. 692; *Shreve* v. *United States*, 103 F. (2d) 796, 813 (C. C. A. 9), certiorari denied, 308 U. S. 570; *United States* v. *Dilliard*, 101 F. (2d) 829, 833 (C. C. A. 2), certiorari denied, 306 U. S. 635; *Havener* v. *United States*, 49 F. (2d) 196, 198 (C. C. A. 10), certiorari denied, 284 U. S. 644.

In the instant case, the conduct of the respondents in holding themselves out as "Ascended Masters," as charged in the indictment (R. 9–10), connoted, at the minimum, that they believed in their own doctrines. Their representations were such that others were to believe that respondents believed in them. It is difficult to imagine a situation in which the belief of the utterer in the truth of his own statements could be more material. The issue of respondents' belief was expressly tendered by the indictment. Each of the representations enumerated in the indictment is followed by the statement that respondents "well knew" the falsity thereof and that the representations were false and fraudulent. Item 20 (R. 21) specifically alleges:

> At the time of making all of the aforealleged representations by the defendants, and each of them, the defendants, and each of them, well knew that all of said aforementioned representations were false and untrue and were made with the intention on the part of the defendants, and each of them, to cheat, wrong, and defraud persons intended to be defrauded, and to obtain from persons intended to be defrauded by the defendants, money, property, and other things of value and to convert the same to the use and benefit of the defendants, and each of them.

The most frequent application of the principle that state of mind may be the subject of ma-

terial misrepresentation is the rule that a misrepresentation of present intention to perform a promise is a misrepresentation of existing fact. *United States* v. *Comyns*, 248 U. S. 349, 353; *Barnard* v. *United States*, 16 F. (2d) 451, 453 (C. C. A. 9), certiorari denied, 274 U. S. 736; *Philadelphia Storage B. Co.* v. *Kelley-How-Thomson Co., supra.* Absence of belief in promissory representations is of the same nature. A person cannot intend to perform that which he does not believe he can perform. *Knickerbocker Merchandising Co.* v. *United States*, 13 F. (2d) 544, 546–547 (C. C. A. 2), certiorari denied, 273 U. S. 729. The misrepresentations of a state of mind may be by conduct, as well as by express words. Thus, the ordering of goods on approval implies a promise to pay and if, at the time the order is placed, the buyer has no intention of paying therefor, he has made a fraudulent misrepresentation of fact. *Tucker* v. *United States*, 224 Fed. 833, 836 (C. C. A. 6), certiorari denied, 241 U. S. 668. See also *Savage* v. *United States*, 270 Fed. 14, 18 (C. C. A. 8), certiorari denied, 257 U. S. 642.

In the present case, the statute prohibits the use of the mails in a scheme for obtaining money by false *or* fraudulent pretenses, representations and promises. The assertion in bad faith of a belief or opinion not honestly entertained under circumstances which would justify reliance on such opinion constitutes fraud. *Shell Oil Co.* v.

State Tire & Oil Co., 126 F. (2d) 971, 974 (C. C. A. 6); *Keeler* v. *Fred T. Ley & Co.*, 65 F. (2d) 499, 501 (C. C. A. 1); *Vulcan Metals Co.* v. *Simmons Mfg. Co.*, 248 Fed. 853, 856 (C. C. A. 2), certiorari denied, 247 U. S. 507; *Goodrich-Lockhart Co.* v. *Sears*, 270 Fed. 971, 977 (E. D. Ky.) Certainly, guides to salvation, announced as the result of divine dictation, are promulgated with the intent of having them relied upon. When, therefore, the jury found that respondents made religious representations without belief in their truth, though to secure the belief of others, and with intent to obtain money, the jury necessarily found that such representations were fraudulent.

B. IN ANY EVENT, UNDER THE INSTRUCTIONS THE JURY NECESSARILY FOUND THAT RESPONDENTS IN BAD FAITH PROPAGATED A PURPORTED RELIGIOUS MOVEMENT IN WHICH THEY DID NOT BELIEVE IN ORDER TO OBTAIN MONEY, AND THIS WAS A FINDING OF A SCHEME TO DEFRAUD UNDER THE MAIL FRAUD STATUTE

Apart from the foregoing considerations, the conviction of respondents should have been affirmed on the ground that the scheme which the indictment charged, the evidence proved, and the jury found, was a scheme to defraud within the purview of the mail fraud statute. In holding that it was necessary for the Government to prove that respondents schemed to make some

representations and that some of such representations must have been shown to be false (R. 1631), the circuit court of appeals adopted an erroneously narrow construction of the mail fraud statute. The history of the statute and decisions interpreting it show conclusively that it provides for alternative offenses, the devising of a scheme or artifice (1) to defraud or (2) for obtaining money or property by means of false or fraudulent pretenses, representations or promises.

The present Mail Fraud Statute (Section 215 of the Criminal Code) is derived from Section 5480 of the Revised Statutes, which provided:

> If any person having devised or intending to devise any scheme or artifice to defraud, to [15] be effected by either opening or intending to open correspondence or communication with any other person, * * * or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, [use the mails] * * * such person, so misusing the Post Office Establishment, shall be punishable by a fine of not more than five hundred dollars, and by imprisonment for not more than eighteen months, or by both such punishments. * * *

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[15] The word "or," rather than "to," was a mistake carried into the Revised Statutes. See *Brand* v. *United States*, 4 Fed. 394 (C. C., N. D. N. Y.).

In 1889 Congress wished to insure the statute's application to certain specific frauds then prevalent, and it reshaped the Section in this form (Act of March 2, 1889, 25 Stat. 873):

> If any person having devised or intending to devise any scheme or artifice to defraud, *or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles,* to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intend-

> ing, shall, in and for executing such scheme or artifice or attempting so to do [use the mails, such person shall be punishable, etc.] [The words added by this 1889 Amendment are in italics.]

That amendment, the courts held, did not limit the phrase "scheme or artifice to defraud" to schemes of the same nature as those enumerated in the added clauses.[16] Conversely, a scheme to sell counterfeit money need not also be a scheme to defraud; the new offenses created by the amendment are separate and distinct from the original offense.[17]

In 1909 section 215 of the Criminal Code superseded section 5480 of the Revised Statutes (35 Stat. 1130), and it has not been altered since that date. The section presently reads:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,* or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit [money] * * *, or any scheme or artifice to obtain money by or

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[16] *MacKnight* v. *United States*, 263 Fed. 832, 834 (C. C. A. 1), certiorari denied, 253 U. S. 493; *Lemon* v. *United States*, 164 Fed. 953, 956 (C. C. A. 8); *Miller* v. *United States*, 133 Fed. 337, 340 (C. C. A. 8); *Milby* v. *United States*, 120 Fed. 1, 4 (C. C. A. 6); *Culp* v. *United States*, 82 Fed. 990 (C. C. A. 3).

[17] *Streep* v. *United States*, 160 U. S. 128, 132.

> through correspondence, by what is commonly called the "sawdust swindle," or "counterfeit-money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "green goods," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do [use the mails], * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both. [Italics added].

By this amendment Congress removed any doubt that still another particular kind of fraud fell within the statute just as the counterfeit frauds were added in 1889.[18] This most recent addition is found in the clause, italicized above, reading:

> or for obtaining money or property by means of false and fraudulent pretenses, representations or promises.

The presence of the disjunctive "or" indicates that the clause is not meant simply as a limitation upon the words "any scheme or artifice to defraud." Consequently, the section can now be read intelligently only in this manner:

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[18] *Moore* v. *United States*, 2 F. (2d) 839, 841 (C. C. A. 7), certiorari denied, 267 U. S. 599; *Bettman* v. *United States*, 224 Fed. 819, 825–826 (C. C. A. 6), certiorari denied, 239 U. S. 642.

> Whoever, having devised or intending to devise any scheme or artifice (a) to defraud, (b) or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, (c) or to sell, dispose of [counterfeit money] * * *, (d) or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle" * * *.[19]

Both before and after 1909 the phrase "scheme to defraud" was broadly interpreted as including all intentional efforts to despoil the public.[20] The significant fact is the intent and purpose. A business legitimate on its face is a scheme to defraud if conducted with intent to deceive. *Myers* v. *United States*, 223 Fed. 919, 925 (C. C. A. 2); *Robinson* v. *United States*, 33 F. (2d) 238 (C. C. A. 9); *Watlington* v. *United States*, 233 Fed. 247, 249 (C. C. A. 8), certiorari denied, 242 U. S. 645; *Clupp* v. *United States*, 18 F. (2d) 906, 907 (C. C. A. 8), certiorari denied, 275 U. S. 548. The use of a legal contract with intent to defraud

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[19] Section 17 of the Securities Act of May 27, 1933, c. 38, Title I, 48 Stat. 74, 84 (15 U. S. C. 77q) makes a similar distinction between use of the mails "(1) to employ any device, scheme, or artifice to defraud or (2) to obtain money or property by means of any untrue statement of a material fact."

[20] *Durland* v. *United States*, 161 U. S. 306, 314; *Brooks* v. *United States*, 146 Fed. 223, 227 (C. C. A. 8); *Foster* v. *United States*, 178 Fed. 165, 172 (C. C. A. 6); *Fournier* v. *United States*, 58 F. (2d) 3, 5 (C. C. A. 7), certiorari denied, 286 U. S. 565; *United States* v. *Rowe*, 56 F. (2d) 747, 749 (C. C. A. 2), certiorari denied, 286 U. S. 554.

is a crime under the statute although use of the same contract with honest intent may be lawful. *Miller* v. *United States,* 133 Fed. 337, 342 (C. C. A. 8); *McConkey* v. *United States,* 171 Fed. 829, 832 (C. C. A. 8). A representation of law, that rules of the Interior Department need not be observed, when made with intent to deceive, is fraudulent, although it may be lawful to decline to follow such rules. *Byrow* v. *United States,* 273 Fed. 769, 772–773 (C. C. A. 9), certiorari denied, 257 U. S. 653. The solicitation of money for medical treatment to be administered without regard to the needs of the patient, i. e., without intent to furnish treatment in good faith, is a scheme to defraud. *Hughes* v. *United States,* 231 Fed. 50, 53 (C. C. A. 5), certiorari denied, 242 U. S. 640. As the Eighth Circuit declared in *Brooks* v. *United States,* 146 Fed. 223, 227, "If the intent and purpose is to deceive and defraud the unwary it matters not what form the project is made to take."

A scheme to defraud may, therefore, exist although no misrepresentations are made in the course thereof. *Shushan* v. *United States,* 117 F. (2d) 110, 115 (C. C. A. 5), certiorari denied, 313 U. S. 574; *Kaufmann* v. *United States,* 282 Fed. 776, 779 (C. C. A. 3), certiorari denied, 260 U. S. 735; cf. *Fournier* v. *United States, supra.* A scheme to secure credit for a corporation by paying bills promptly and, after credit has been established, buying large quantities of material intend-

ing not to pay therefor, is a scheme to defraud although there is no misrepresentation of a single existing fact. *Kaufmann* v. *United States, supra.* The statute extends to a scheme to use the mails to bribe a competitor's employees in order to obtain trade secrets. *United States* v. *Proctor & Gamble Co.*, 47 F. Supp. 676 (D. Mass.). In a number of recent cases, the courts have held that use of the mails to effectuate the fraudulent conduct of the fiduciary or to further some other intentional breach of trust comes within the interdiction of the statute although no misrepresentations are expressed. *Steiner* v. *United States,* 134 F. (2d) 931, 933 (C. C. A. 5), certiorari denied, 319 U. S. 774; *Glover* v. *United States,* 125 F. (2d) 291, 293 (C. C. A. 5), certiorari denied, 316 U. S. 690; *United States* v. *Groves,* 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, 314 U. S. 670; *Leche* v. *United States,* 118 F. (2d) 246 (C. C. A. 5), certiorari denied, 314 U. S. 617; *United States* v. *Buckner,* 108 F. (2d) 921, 926 (C. C. A. 2), certiorari denied, 309 U. S. 669.

Under the narrowest possible construction of the judge's charge in the instant case the jury must at least have found that respondents organized a purported religious movement in bad faith with intent to obtain money thereby. The scheme was, in substance, charged in the indictment.[21] If

[21] It is well established that, in a mail fraud case, the scheme need not be outlined with particularity, since the gist of the offense is the use of the mails. *Leche* v. *United States,* 118

all the allegations of fraudulent misrepresentation are eliminated therefrom, there still remains the accusation that respondents schemed to defraud the followers of the "I Am" movement by inducing them to join the organization (R. 3–4); by dominating the St. Germain press (R. 5, Sub. B, D); by arranging for meetings, classes and broadcasts at which the doctrines of the "I Am" movement were taught (R. 6–7, Sub. G–I). The evidence (see Statement, *supra*) amply supports the jury's finding that respondents devised this scheme in bad faith in order to obtain money. Such a scheme is similar to a breach of trust. Those who hold themselves out as religious leaders and in that capacity solicit contributions for their own use are accountable to the highest fiduciary standards, for they seek and obtain the utmost trust of their following. Where it is shown, as it was here, that they have played upon the religious instincts of others as a device for mulcting the public, their conduct comes within the prohibition of the statute at least as clearly as the conduct of public officials or directors of a corporation who have used the mails to further a breach of trust. Cf. cases cited *supra*, p. 46. Whatever its nature, it is clear

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F. (2d) 246 (C. C. A. 5), certiorari denied, 314 U. S. 617; *United States* v. *Lowe*, 115 F. (2d) 596, 598 (C. C. A. 7), certiorari denied, 311 U. S. 717; *United States* v. *Minnec*, 104 F. (2d) 575, 577 (C. C. A. 7), certiorari denied, 308 U. S. 577; *Havener* v. *United States*, 49 F. (2d) 196, 198 (C. C. A. 10), certiorari denied, 284 U. S. 644; *Savage* v. *United States*, 270 Fed. 14, 18 (C. C. A. 8), certiorari denied, 257 U. S. 642.

that the scheme found by the jury was an intentional effort to despoil the public for respondents' personal profit. As the foregoing cases demonstate, such a scheme was a scheme to defraud, condemned by the statute.

CONCLUSION

The circuit court of appeals found no error in the conduct of the trial, other than the trial court's definition of the issues. Since the issues, as so defined, constituted an offense under the statute and the trial judge's statement was approved and relied upon by counsel for the defense, it was error to predicate reversal upon the statement. We therefore respectfully submit that the judgment of the circuit court of appeals should be reversed and that the judgments of conviction should be affirmed.

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